



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/32902/2013

THE IMMIGRATION ACTS

**Heard at Field House
On 3 November 2014**

**Determination
Promulgated
On 27 November 2014**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MAJIDAH BEGUM

Respondent

Representation:

For the Appellant: Miss Sreeraman, Presenting Officer

For the Respondent: Mr A Khushi, Solicitor

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission against the determination of First-tier Tribunal Judge Adio promulgated on 22 July 2014 in which he allowed her appeal against the decision of the Secretary of State made on 3 July 2013 to refuse to vary her leave to remain in the United Kingdom.
2. The respondent was born on 1 January 1950 and is a citizen of Pakistan. She most recently arrived in the United Kingdom on 5 May 2013 with entry clearance as a visitor and on 22 May 2013 applied for leave to remain pursuant to Article 8 of the Human Rights Convention.

3. The respondent had previously been in the United Kingdom but had returned to Pakistan for a short visit as her husband had died there on 20 April 2013 with a heart condition. She suffers from depression and also from a heart condition. She has no close relatives left in Pakistan; she lives with her son, Asad, who is married to a Slovakian national. She also has another son and daughter living in the United Kingdom.
4. The Secretary of State considered did not meet the requirements of paragraph 276ADE of the Immigration Rules noting in particular that she has spent 63 years in Pakistan, a relatively short time in the United Kingdom and had not established that she had no ties to Pakistan. She considered it would not breach the United Kingdoms obligations pursuant to Article 8 of the Human Rights Convention to return her to Pakistan.
5. On appeal, it was accepted by the respondent's representative that she did not meet the requirements of the Immigration Rules.
6. First-tier Tribunal Judge Adio found:-
 - (i) that there were compelling circumstances not sufficiently recognised by the Immigration Rules [10] and that there were compassionate circumstances outside the Immigration Rules;
 - (ii) that the respondent's children and daughter-in-law take care of the respondent and she is reliant on them in the United Kingdom, living with her first son; and that there is family life between her and her children in the United Kingdom [12];
 - (iii) that the respondent is depressed, in a very low mood and is constantly crying [13]; and other than the maintenance of the Immigration Rules there is no public cost for the respondent being in the United Kingdom as her medication is funded by her family [15] the issue being whether it is proportionate to the legitimate public end to be achieved;
 - (iv) that although she had no legitimate expectation to remain after six months, the appellant is 64 years of age, she was recently hospitalised and lost her husband and in a very depressed mood [16]; and
 - (v) that there was concern that the respondent's mental and physical health will deteriorate were she returned to Pakistan where she has no one to look after her and requires the support of her children [17];
 - (vi) that the respondent has no one to live with in Pakistan and that accordingly her removal would be disproportionate to her right for respect for private life.
7. The Secretary of State sought permission to appeal on the grounds:

- (i) that the judge made no findings as to arguably good grounds and compelling circumstances not sufficiently recognised under the Rules [5] and
 - (ii) that without making adequate findings as to arguably good grounds and compelling circumstances not sufficiently recognised under the Rules, the judge cannot undertake a freestanding Article 8 assessment [6].
8. On 17 September 2014 First-tier Tribunal Judge T R P Hollingworth granted permission stating:-

“In circumstances where the appellant could not satisfy the requirements of the Rules and where the medical evidence was not extensive it appears that insufficient weight was attached to the public interest element and the Article 8 evaluation.

All grounds are arguable.”

The Hearing

9. Miss Sreeraman sought permission to adduce before the Upper Tribunal evidence that had not been before the First-tier Tribunal. She did so purporting to rely on Rule 15(2A) of the Upper Tribunal (Procedure) Rules 2007. This application was not made on notice received and when probed further it appeared that what was being sought was permission to adduce at the error of law stage material which had not been before the First-tier Tribunal. Miss Sreeraman was unable to explain to me why, in light of the decision of **E v SSHD [2004] EWCA Civ 49** the **Ladd v Marshall** principles were satisfied, that is:-
- (i) that the new evidence could not with reasonable diligence have been obtained for use at the trial or hearing; and
 - (ii) that the claimed errors are be such that given, it would probably have an important influence on the start of the case (although it need not be decisive) that the new evidence was apparently credible although it need not have been in controvertible.
10. Miss Sreeraman was unable to satisfy me as to any reason why this material which, by her admission, must have been before the Secretary of State years before the hearing yet had not been produced. Accordingly this application failed at the first hurdle.
11. Miss Sreeraman submitted that **Gulshan Article 8 - new Rules - correct approach** [2013] UKUT 640 (IAC) establishes that there is a two stage test in that there is a threshold to be overcome before a judge can go on to consider Article 8, citing **MM (Lebanon)** [2014] EWCA Civ 985 and **R (Ganesabalan) v SSHD** [2014] EWHC 2712 (Admin) as further authorities in support of this proposition.

12. Miss Sreeraman submitted also that it was implicit in the grounds that a challenge was made to the assessment of proportionality carried out by the judge and that he had failed to give due weight to the public interest.
13. Mr Khushi submitted that there was a threshold test and that the judge had given adequate reasons as to why he had gone on to consider Article 8 outside the Rules. He submitted also that the judge had given appropriate and adequate consideration for weight to be given to the public interest in this case and that it was implicit in his reasoning that he had attached due weight to the public interest which, he accepted, includes the maintenance of a system of immigration by Rules applied to all.

Did the decision of the First-tier Tribunal involve the making of an error of law?

14. I note from **MM and Others** at [131] and [135]:

131. We did not specifically hear argument on whether the new MIR together with the Guidance constituted a "comprehensive code". But whether or not they do makes no difference, on the analysis of the Master of the Rolls in ***MF(Nigeria)***. This is because, as he said at [45], in any event it would be necessary to apply a "proportionality test" with regard to the "exceptional circumstances" guidance in order to be compatible with the Convention and in compliance with ***Huang*** at [20].^[144]

...

135. Where the relevant group of IRs, upon their proper construction, provide a "complete code" for dealing with a person's Convention rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals",^[152] then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise.^[153] But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the ***Huang*** tests and UK and Strasbourg case law.^[154]

15. I note also from **Ganesabalan** at [24] - [25]

24. The question of what "assessment of Article 8" is called for in the circumstances, and in particular whether there is a need for "a full separate consideration" is, in my judgment, a different matter. It does not obviate the duty on the decision maker to consider the exercise of discretion.

25. This topic was considered by Green J in **Ahmed**. Under a heading "good arguable case needed to trigger an Article 8 review outwith the Rules" the judge considered **Nagre** and another authority cited to him (paragraphs 31 to 32). He then picked up the point at paragraphs 36 to 39. Of significance, in my judgment, in considering that analysis are two points. Firstly, Green J recognised at paragraph 33:

" ... it is important that officials applying the residual exceptional circumstances policy should be vigilant to avoid a tick box mentality and should bear the policy guidance in mind seeking to stand back after working

through the analysis required so as to formulate in an overall manner a view as to whether there might be a good arguable case of disproportionality if leave to remain was not granted."

That passage, in my judgment, very clearly recognises that, having addressed the Immigration Rules and reached conclusions on their application, there is a duty by reference to the guidance on the decision maker then to step back and formulate a view. The need for a view is not triggered by there being some good arguable basis. Rather, as Green J there explains, one of the questions – indeed the first question – to be considered in formulating that view, is the question whether there might be a good arguable case.

16. It is evident from these cases that there is no two stage process as the Secretary of State appears to envisage; there is no threshold to be overcome before the issue of proportionality is to be considered.
17. The grant of leave is, however, wider than that sought by the respondent. It expands it into the area of public interest.
18. Whilst Judge Adio does refer in places to the public interest, this appears to be connected solely to economic issues rather than the importance attached to the maintenance of immigration control per se or the public interest in the maintenance of a system of Rules applicable to all. Further, there is no indication that he attached due weight to the fact that the appellant did not meet the requirements of the Immigration Rules. Accordingly, I am satisfied that the decision of First-tier Tribunal Judge Adio did involve the making of an error of law.
19. I am satisfied also that it was material and affected the outcome of the decision, given the failure to take into account or attach proper weight to the public interest.
20. With regard to remaking the appeal, as this appeal will now need to take account of Section 117 of the 2002 Act as well as the new amended provisions of Appendix FM and paragraph 276ADE of the Immigration Rules. It will also be necessary, to consider, as was raised in the initial grounds of appeal to the First-tier Tribunal, whether the appellant is entitled to leave to remain pursuant to Regulation 71(1)(c) of the Immigration (European Economic Area) Regulations 2006.
21. In the circumstances, given the extent of further judicial fact finding which will be necessary, I consider it appropriate to remit the matter to the First-tier for a fresh hearing on all issues.

Signed

Date **27 November 2014**

Upper Tribunal Judge Rintoul